No. 23-477

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JONATHAN SKRMETTI, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR CONCERNED WOMEN FOR AMERICA AND SAMARITAN'S PURSE AS *AMICI CURIAE* IN SUPPORT OF STATE RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with about half a million supporters in all 50 states. CWA advocates for traditional values that are central to America's cultural health and welfare. CWA is made up of people whose voices are often overlooked—average American women whose views are not represented by the powerful or the elite. CWA has a substantial interest in this case.

Samaritan's Purse is a nondenominational, evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing crisis relief, sharing the hope and love of Jesus Christ with those in the gutters and ditches of the world in their darkest hour of need. Samaritan's Purse's concern arises when concepts of Biblical and scientific reality are threatened by executive, legislative, or judicial action compelling ideologies that diminish common grace related to safety, fairness, privacy, speech, and religious free exercise.*

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* Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to it.

SUMMARY OF THE ARGUMENT

Laws protecting children from novel, sterilizing gender transition drugs and surgeries are not constitutionally suspect. These laws do not discriminate based on sex, for they apply equally to boys and girls: no child may be subjected to these interventions. That some of these drugs are used for other purposes in children does not show discrimination based on sex, but differentiation based on treatment—which does not give rise to heightened scrutiny. Ignoring this difference in use violates this Court's precedent requiring comparison of similarly situated classes. Here, boys or girls—and children of any gender identity—could seek regulated transitioning interventions, so the statute does not classify based on sex or gender identity.

If the United States were right that Tennessee's law discriminates based on sex because its regulation "depends" on sex, Br. 24, that theory would be self-defeating. That is because it would be transitioning *providers* doing the discriminating: diagnosing gender dysphoria based on gender stereotypes, picking cross-sex hormones based on sex, and deciding whether to treat based on gender identity. The United States says "[t]hat is sex discrimination." Br. 16, 22. Not only would the United States' theory thus mean that transitioning providers (who receive federal funds) are violating federal law, Tennessee's law would be justified as a remedial provision. Prohibiting sex discrimination could not violate the Equal Protection Clause.

Applying intermediate scrutiny here would lead to an avalanche of highly fraught litigation without

neutral principles for judicial resolution. Not only would the United States' theory subject to heightened scrutiny innumerable regulations that logically apply only to one sex—many laws related to medical practice, FDA approvals, and much else—but it would also open a new field of litigation about sex-separated activities and policies. While some litigation exists already, typically the challengers do not contest the underlying sex separation. Deeming transgender status a new suspect classification would open the door to endless challenges about sports, facilities, living areas, prisons, shelters, health insurance, healthcare, and schools.

The onslaught of new litigation on sensitive, politically charged policies would be bad enough. Worse, the litigation would be fought on the uncertain terrain of intermediate scrutiny, where the critical inquiries—an "important" governmental interest and a "substantial relationship" between the policy and that interest—have no neutral principles to guide courts. Faced with such judicially unanswerable questions, judges are certain to reach widely varying results, inevitably tending to align with their personal preferences. Like cases would be decided differently based on happenstance, and judicial legitimacy would suffer. All this might be acceptable if intermediate scrutiny were demanded by the Constitution, rather than being an invention of the 1970s with no foundation in the Equal Protection Clause's history—and typically invoked by *male* plaintiffs. But intermediate scrutiny is both unmoored from the Constitution *and* incapable of neutral application. The Court should not extend such a tenuous innovation to new areas. It should affirm.

ARGUMENT

I. Tennessee's law is not subject to heightened scrutiny.

Tennessee's law does not discriminate based on sex. No matter one's sex or gender identity, a minor cannot access the interventions. The policy is based on age and treatment, not sex. That some of the regulated treatments differ between sexes does not make their regulation sex-based, given that all similarly situated persons are treated the same.

A. The law does not discriminate based on sex.

Tennessee's law "applies equally to both sexes": neither can access gender transitioning medical interventions. *Eknes-Tucker* v. *Gov. of Ala.*, 80 F.4th 1205, 1228 (CA11 2023). The United States does not seem to dispute the Sixth Circuit's holding that the law "does not prefer one sex over the other," "does not bestow benefits or burdens based on sex," and "does not apply one rule for males and another for females." App. 32a. Neither sex can access puberty blockers to transition. And neither sex can access cross-sex hormones to transition. Though those hormones differ depending on whether the minor is male or female, that simply reflects that each operation—males taking estrogen or females taking testosterone to transition—is one that "only one sex can undergo." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022).

Even applying *Bostock*'s "straightforward rule" for but-for causation leads to the same result: "chang[e] the [person's] sex" and see if it "yield[s] a different

choice." *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 659 (2020). Here, neither boys nor girls can access transitioning interventions, so there is no facial sex discrimination.

The United States argues that the law "prohibits an adolescent assigned female at birth from receiving testosterone to live as a male, but allows an adolescent assigned male at birth to receive the same treatment." Br. 28; see Br. 21–22. So, the United States insists, "holding other things constant but 'changing the [minor]'s sex . . . yield[s] a different' outcome," which "is sex discrimination." Br. 22 (quoting *Bostock*, 590 U.S. at 659).

But the United States fails to "hold[] other things constant." *Ibid.* Giving a girl under age 10 puberty blockers to treat precocious puberty has no relation to giving a boy above age 10 puberty blockers to halt normally-timed puberty. (It also seemingly has nothing to do with "liv[ing] and present[ing] as a female," Br. 21–22, at least as far as the United States bothers to explain.) And giving a boy with an endocrine disorder testosterone has no relation to giving a girl testosterone to transition. (And, again, that use of testosterone in a boy is not "to live and present as a male," Br. 21, but to treat an endocrine disorder.) Plus, *other* testosterone treatments in a male adolescent—say, to become a body builder (perhaps "to live and present as a male," if one were stereotyping like the United States does here?)—are generally *prohibited*. See Tenn. Code Ann. § 39-17-430(a)(2). All this shows that the law regulates based on treatment, not sex.

Substituting one of the law's prohibitions on *surgeries* into the United States' argument makes the point even clearer: "an adolescent assigned male at birth cannot receive [a penectomy] to live and present as a female, but an adolescent assigned female at birth can." Br. 21–22. The argument is nonsensical, because a female cannot undergo a penectomy. Likewise, a female cannot be treated with testosterone for male endocrine disorders.

More broadly, the United States' recognition that it *ought* to hold other things constant refutes its own premise that the Court should disregard the difference in treatments regulated by the law and other treatments. See U.S. Br. 25–26; see also L.W. Br. 35–36. If the Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike," *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), one cannot assess whether a statute facially discriminates without determining whether similarly situated persons are in fact treated differently based on the relevant characteristic.

As this Court said in *Bostock*, "[t]o 'discriminate against' a person" would require "treating that individual worse than others who are similarly situated." 590 U.S. at 657. "[O]rdinary equal protection principles" "includ[e] the similarly situated requirement." *United States* v. *Armstrong*, 517 U.S. 456, 467 (1996). "When those who appear similarly situated are nevertheless treated differently," *then* "the Equal Protection Clause requires [some] reason for the difference." *Engquist* v. *Oregon Dep't of Agr.*, 553 U.S. 591, 602 (2008); see also, *e.g.*, *Alabama Dep't*

of Revenue v. *CSX Transp., Inc.*, 575 U.S. 21, 27–28 (2015) ("In the Equal Protection Clause context," only those who "are regarded as similarly situated" are "entitled to equal treatment."). If the individuals are not similarly situated, there is no discrimination at all and heightened scrutiny could not apply.

Here, as Tennessee explains, boys or girls desiring puberty blockers to treat precocious puberty at 8 are not similarly situated to boys or girls desiring puberty blockers to transition at age 11. A boy desiring testosterone to treat an endocrine disorder is not similarly situated to a girl desiring testosterone to transition (or to a boy desiring testosterone to become a body builder). And a girl desiring estrogen to treat an endocrine disorder is not similarly situated to a boy desiring estrogen to transition.

An analogy may help expose the problem with the United States' theory. Take a new drug that would change one's skin pigmentation. That drug has no other use. If the government banned all use of that drug as dangerous—say, the FDA refused to approve it—would it have discriminated based on race? Surely not—no one, regardless of race, could access it.

Now change the hypothetical so that the drug has other (permissible) uses—say, at a low dose, it can treat migraines. If the government passed a law saying that the drug could not be used for the purpose of appearing as a different race, would it discriminate based on race and thus be subject to strict scrutiny? It's hard to see how the result would change, simply because the drug could be used in other contexts—requiring the government to spell out the prohibited use. Again, as long as that use was prohibited across

the board, there is no discrimination. The law would differentiate based on *treatment*—like Tennessee's law.

The United States insists that the fact that the drugs here have other uses makes all the difference. According to the United States, this scenario is "fundamentally differ[ent]" because it involves "medical treatments that all individuals *can* receive, regardless of their sex." Br. 26. But as the self-proclaimed "experts on gender-affirming care" helpfully set out, hormone interventions are fundamentally different when used to treat gender dysphoria as compared to other conditions. See Br. of Experts on Gender Affirming Care App. B.[1] Other uses of the drugs involve different diagnoses, uses, purposes, risks, and effects. And again, because the relevant comparison is between *treatments*, the law is based on treatment—not sex.

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[1] The "experts" nonetheless support the United States because they lump in treatments for gender dysphoria with treatments for a wide range of unrelated medical conditions under the banner "gender affirming care." Not only does this effort depend on their own gender stereotyping detached from medical diagnosis, it is premised on the very manipulation of "the level of generality" that they accuse others of. Br. of Experts on Gender Affirming Care 4. And even these experts do not pretend that puberty blockers are somehow "gender affirming" in their other primary use, to treat precocious puberty in younger children; they, like the United States, ignore puberty blockers almost entirely.

B. The law does not discriminate based on transgender status.

Likewise, a minor can be cisgender, agender, transgender, non-binary, or anything else—and the minor cannot access transitioning interventions. The United States hardly articulates how the law discriminates based on transgender status, claiming in a passing sentence that the law "exclusively targets" "transgender individuals." Br. 28–29.

Not so. Many transgender individuals do not seek the interventions.[2] That alone means that no facial discrimination exists. See *Geduldig* v. *Aiello*, 417 U.S. 484, 496 n.20 (1974); *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993).

What's more, some individuals who do not identify as transgender seek the interventions.[3] Many individuals that seek the interventions (and identify as transgender now) will *not* ultimately identify as transgender.[4] And, the United States has suggested,

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[2] "[N]ot all" transgender people suffer from gender dysphoria, and only some with gender dysphoria "seek[] medical treatment to alter body characteristics." Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451–54 (5th ed. 2013) (hereinafter "DSM-5"); W. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons*, 102 J. Clinical Endocrinology & Metabolism 3869, 3875 (2017) (similar).

[3] J. Hodax & S. DiVall, *Gender-Affirming Endocrine Care for Youth with a Nonbinary Gender Identity*, 14 Therapeutic Advances in Endocrinology & Metabolism (2023), https://doi.org/10.1177/20420188231160405; see also *Gore* v. *Lee*, No. 3:19-cv-0328, 2023 WL 4141665, at *15 (M.D. Tenn. June 22, 2023), *aff'd*, 107 F.4th 548 (CA6 2024).

[4] DSM-5, *supra* note 2, at 455–56.

"transgender status is immutable," so on that theory, these individuals were never transgender. Brief for the United States as Intervenor-Appellee 31, *Eknes-Tucker*, No. 22-11707, 2022 WL 3369276 (CA11 Aug. 10, 2022); but see U.S. Br. 30 (hedging).

Thus, because both groups here—those who seek and those who do not seek regulated interventions—may include individuals of all gender identities, there is no discrimination based on transgender status.

* * *

Two codas to this discussion. *First*, the United States obsesses over the legislative declaration that Tennessee has an interest "in encouraging minors to appreciate their sex" rather than "become disdainful of [it]." Tenn. Code Ann. § 68-33-101(m); see U.S. Br. 2, 8, 16–18, 22, 27, 32–34, 49. This generalized declaration with no legal effect does not change the statute's lack of facial sex or gender identity discrimination.

In any event, the United States' fixation is odd. Its own favored medical interest groups have explained the goal of treatments for gender dysphoria in similar terms: "the goal is for individuals with gender dysphoria to experience 'identity integration,' where 'being transgender is no longer the most important signifier of one's identity.'"[5] As their own source

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[5] Brief of *Amici Curiae* American Academy of Pediatrics, American Medical Association, American Psychiatric Association, and 10 Additional Health Care Organizations in Support of Appellees 24, *Hecox* v. *Little*, Nos. 20-35813, 20-35815, 2020 WL 7866621 (CA9 Dec. 21, 2020).

continues, "[i]ntegration implies a deeper level of self-acceptance."[6] Why only the AMA et al. may aim for "self-acceptance" is left unexplained.

Second, even if the law somehow discriminated on transgender status, it is not obvious that it would discriminate based on *sex*, which refers to "biological distinctions." *Bostock*, 590 U.S. at 655; see *id.* at 660 (discussing a hypothetical of "an employer who fires a transgender person" that makes sense only if the person's sex is biological). *Bostock* assumed a simple definition: transgender means the opposite of one's biological sex. See *id.* at 660–61 ("transgender status [is] inextricably bound up with sex"). The United States parrots this assumption without offering a clear definition of its proposed new suspect classification. See Br. 29 (transgender individuals' "gender identities do not align with their respective sexes assigned at birth"); see also L.W. Br. 4 (transgender "means" "a gender identity that differs from the sex [a person was] assigned at birth").

But purportedly there are "more than 100 gender identities."[7] And, the American Academy of Pediatrics tells us, being transgender is not limited to those "whose gender identity does not match their assigned sex," but "also encompasses many other labels individuals may use to refer to themselves" and "can

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[6] W. Bockting & E. Coleman, *Developmental Stages of the Transgender Coming-Out Process: Toward an Integrated Identity*, in *Principles of Transgender Medicine and Surgery* 137, 153 (2d ed. 2016).

[7] The Trevor Project, *National Survey on LGBT Youth Mental Health 2019*, at 7, https://perma.cc/5MTL-GFBG.

be fluid, shifting in different contexts."[8] For instance, a prominent athlete who is biologically female and identifies as transgender and non-binary recently competed for the United States in the Olympics—in the female competition.[9] Nothing prohibits a biological female from identifying as a transgender female.

Needless to say, the United States has no explanation for any of this, but because it cannot even explain how the law here is based on gender identity to begin, the Court need not confront these puzzles. The law does not discriminate based on sex or transgender status.

II. The United States' theory is self-defeating.

If the United States were right that Tennessee's law discriminates based on sex because "there is no way to determine whether these treatments" are proper "without considering the minor's sex," Br. 22 (cleaned up), that would mean that the law simply forbids sex discrimination *by medical providers*—making it a lawful remedial measure subject only to rational basis review.

As gender-transition specialist and expert witness for the United States Dr. Daniel Shumer recently testified, doctors choose many gender transition procedures—including cross-sex hormones—based on

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[8] J. Rafferty, *Ensuring Comprehensive Care & Support for Transgender & Gender-Diverse Children & Adolescents*, 142 Pediatrics no. 4, at 2 (Oct. 2018), https://perma.cc/8PYT-CGUG.
[9] I. Yip, *Nonbinary runner Nikki Hiltz advances to semifinals for Team USA*, NBC News (Aug. 6, 2024), https://perma.cc/AJ75-2MPS.

sex. *Boe* v. *Marshall*, No. 22-cv-184, Doc. 557-39, at 90:1–2, 94:9–95:23 (M.D. Ala. May 27, 2024), https://perma.cc/QX46-EU6W (hereinafter "Shumer") ("I would need to know their anatomical hormonal sex."). Doctors would not perform a penile inversion on a female. They would not give a male testosterone to transition, or a female estrogen. *Id.* at 90:15–18; see U.S. Br. 5 ("feminizing hormones" for boys and "masculinizing hormones" for girls); Hembree, *supra* note 2, at 3886–87; see also E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 Int'l J. Transgender Health, S128–30 (2022) (separating surgical options by persons "assigned male at birth (AMAB) and assigned female at birth (AFAB)").

Transitioning providers similarly make these decisions based on gender identity, refusing interventions to those whose gender identity aligns with their sex (or are non-binary or other). Shumer 98:14–99:10. And they consider gender nonconformity, as the gender dysphoria diagnosis itself is founded in stereotypes like whether a person prefers "typical masculine clothing," "games[] or activities stereotypically used or engaged in by the other gender," and "playmates of the other gender." DSM-5, *supra* note 2, at 452.

Asked if his transitioning treatments discriminate based on sex, Dr. Shumer insisted that these choices simply reflect "appropriate medical management." Shumer 99:18–100:2. But on the United States' theory, these choices constitute facial sex discrimination. As the United States says, "there is no way to determine whether these treatments [should be

given to] any particular minor without considering the minor's sex." Br. 26. Providers give medical transition interventions "only when [they] would induce physiological effects inconsistent with an individual's sex assigned at birth," U.S. Br. 21, prescribing treatments "for the express purpose of" making "minors conform to overbroad sex-based generalizations." L.W. Br. 17–18. For transitioning, "a minor assigned []male at birth is prohibited from receiving the same testosterone medication that a minor assigned [fe]male at birth might receive." L.W. Br. 17; see U.S. Br. 5.

On the United States' theory, "[t]hat is sex discrimination." Br. 22; see also Yale Philosophers Br. 6 (action "is sex-based" if it requires "first classifying a minor as 'male' or 'female'"). And prohibiting these discriminatory treatments could not itself be unlawful discrimination. Thus, on the United States' own theory, Tennessee's law would merely prohibit sex discrimination and could be upheld on that basis. Cf. *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the" Fourteenth Amendment.); *Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966) (upholding "a reform measure aimed at eliminating" discrimination on rational basis review).

Of course, the United States' theory would have more severe ramifications for gender transitioning providers. Those that accept federal funds would be violating federal law. See 42 U.S.C. § 18116(a)

(prohibiting sex discrimination under "any health program or activity, any part of which is receiving Federal financial assistance"). Those in state-run hospital systems could be violating the Constitution. And many other practitioners would also be at risk, including all who perform medical procedures used only in one sex. Fertility clinics, for instance, would act unlawfully by deciding to implant fertilized eggs only in females.

Continuing the descent into madness, if the United States were right that Tennessee's law discriminates based on sex, then a provider would also discriminate by offering transitioning hormones—say, testosterone for females to look more "masculine"—and refusing to offer testosterone for males who want to look more "masculine." Cf. Tenn. Code Ann. § 39-17-430(a)(2). Same goes for any number of other implants, augmentations, enhancements, and drugs.

All this is nonsense. That gender transition interventions "are themselves sex-based" does not make every regulation pertaining to them discriminatory. *Eknes-Tucker*, 80 F.4th at 1228. "[T]reatments for gender dysphoria are different for males and for females because of biological differences between" them. *Ibid.* Slicing off a boy's genitals is not the same procedure as correcting a girl's congenital absence of a vagina. Giving a girl testosterone to transition is not the same procedure as giving testosterone to a male to treat hypogonadism (or to win the Tour de France). The United States' theory is incoherent and self-defeating.

III. Adopting the United States' theory would lead to an avalanche of intractable litigation without constitutional basis.

If the Court were to adopt the United States' theory and extend intermediate scrutiny to this context—either by reading Tennessee's law as facially discriminatory or by creating a new suspect classification for transgender status—the consequences would be severe. Endless litigation would result involving some of the Nation's most contentious issues. Courts confronting that litigation would be forced to apply perhaps the most subjective, value-laden, and unpredictable test known to constitutional law: intermediate scrutiny. Especially in these types of cases, that test will inevitably lead to disparate results based on perceived policy preferences. Worst of all, the courts would sally forth on this policy battlefield under the flag of a constitutional test fabricated in the 1970s, without basis in the text or history of the Equal Protection Clause. If ever there were a doctrine to decline to extend and a new context that did not warrant it, it is the made-up doctrine of intermediate scrutiny and the context of gender issues under active policy discussion throughout the country.

A. Applying intermediate scrutiny here would lead to endless litigation about the many policies premised on the reality that the two sexes are physically different.

Expanding intermediate scrutiny as demanded by the United States would spawn significant litigation across a range of government policies. As discussed, the United States' theory makes it irrelevant to the

level of review whether two classes are "similarly situated" and makes transgender status a suspect classification. Adopting this theory would lead to extensive litigation—much of it highly fraught and not susceptible to principled judicial resolution.

First, many laws, FDA decisions, and other government policies regulate medical interventions that only one sex can undergo, on any sensible understanding. Adopting the United States' view would lead to litigation invoking intermediate scrutiny for all these policies. See, *e.g.*, 18 U.S.C. § 1531(b)(1)(A) (protecting babies birthed from "mother[s]"); 42 U.S.C. § 1395dd(c)(2)(A) (similar); Cal. Health and Safety Code § 123640(a) (requiring mental health screenings only for "mother[s]"); Mass. Gen. Laws Ann. ch. 111, § 121A (similar); 42 C.F.R. § 410.56 (similar); Cal. Penal Code § 273.4 (prohibiting female genital mutilation); W. Va. Code § 16-11-1 (licensing requirement on female sterilization procedures); *FDA approves new treatment for hypoactive sexual desire disorder in premenopausal women* (June 21, 2019), https://perma.cc/AJU9-4GFA; *FDA approves first treatment for post-partum depression* (Mar. 19, 2019), https://perma.cc/K2CU-HEA5; *FDA approves new treatment for osteoporosis in postmenopausal women at high risk of fracture* (Apr. 9, 2019), https://perma.cc/QVF6-U4B7; *FDA approves Intrarosa for postmenopausal women experiencing pain during sex* (Nov. 17, 2016), https://perma.cc/WTE6-3DDC; *Gore* v. *Dorchester Cnty. Sheriff's Off.*, No. 2:22-cv-2322-RMG, 2024 WL 4151147, at *9 (D.S.C. Sept. 11, 2024) (equal protection claim against prison practice under which

"males are not required to" "remove their menstruation devices").

Second, as Chief Judge Sutton explained, making transgender status a suspect classification would lead to extensive litigation about "[b]athrooms and locker rooms," "[s]ports teams and sports competitions," living facilities, prisons, shelters, health insurance benefits, birth certificates, and much more. App. 45a. Of course, many of these topics already involve litigation, but in the existing cases, most plaintiffs "disavow[] any challenge to sex separation" as a general matter. *B.P.J.* v. *W. Virginia State Bd. of Educ.*, 98 F.4th 542, 555 (CA4 2024).

Adopting a new suspect classification would transform these cases—and lead to many, many more of them. "Any person with standing to challenge any" one of these new "sex-based classification[s]" could "haul the [government] into federal court and compel it to establish by evidence (presumably in the form of expert testimony) that there is an 'exceedingly persuasive justification' for the classification." *United States* v. *Virginia*, 518 U.S. 515, 597 (1996) (Scalia, J., dissenting).

The United States' theory would also lead to unanswerable questions. It is impossible to maintain activities or facilities that are separated by *both* sex and gender identity. As soon as a school permits a boy to run on the girls' cross-country team, for instance, that team is no longer sex-separated. Then presumably it would also discriminate based on gender identity to keep males who identify as males from that formerly female team. This interpretation would put many government agencies "in an

impossible position" and spawn still more litigation. *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 737 (CA4 2016) (Niemeyer, J., concurring in part and dissenting in part); see also *Adams* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 814 (CA11 2022).

B. Extending intermediate scrutiny would embroil the courts in intractable policymaking disputes.

Expanding intermediate scrutiny as the United States demands would lead to endless judicial conflicts in highly fraught cases like those just discussed. Because intermediate scrutiny is, in reality, policymaking, courts will inevitably reach contradictory conclusions. All these conflicts would be at this Court's doorstep soon enough, often in an emergency posture. And this Court, like other courts, would have no other mechanism to resolve them but its own policymaking, putting this Court's legitimacy at risk. These certain consequences are another good reason to reject the United States' request to extend the subjective and indeterminate test of intermediate scrutiny.

It is no secret that intermediate scrutiny is a "judge-empowering interest-balancing inquiry." *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 22 (2022) (cleaned up). Its central questions—an "important" governmental interest and means "substantially related" to that interest, *Virginia*, 518 U.S. at 524—are (to put it mildly) difficult for judges to resolve in a principled way. In the end, intermediate scrutiny "is policy by another name": "It requires judges to weigh the benefits against the burdens of a law and to uphold the law as constitutional if, in the

judge's view, the law is sufficiently . . . important." *United States* v. *Rahimi*, 144 S. Ct. 1889, 1920 (2024) (Kavanaugh, J., concurring).

From the doctrine's fabrication in the 1970s, Justices and judges have recognized the impossibility of answering the questions posed by intermediate scrutiny in a neutral, judicially administrable way. As then-Justice Rehnquist explained:

> How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives or, whether the relationship to those objectives is "substantial" enough.

Craig v. *Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting); see also, *e.g.*, J. Senior, *In Conversation: Antonin Scalia*, New York (Oct. 4, 2013), https://perma.cc/NLQ5-CJY4 ("I am not a fan of different levels of scrutiny. Strict scrutiny, intermediate scrutiny, *blah blah blah blah*. That's just a thumb on the scales."); *Virginia*, 518 U.S. at 571, 597 (Scalia, J., dissenting) (noting the "imponderable" and "vacuous" occasional addition—mysteriously omitted by the United States here—of "exceedingly persuasive" to the intermediate scrutiny test); B. Kavanaugh, *Keynote Address: Two Challenges for the*

Judge As Umpire: Statutory Ambiguity and Constitutional Exceptions, 92 Notre Dame L. Rev. 1907, 1919 (2017) ("there are no guideposts"); *Heller* v. *District of Columbia*, 670 F.3d 1244, 1278 (CADC 2011) (Kavanaugh, J., dissenting) (noting "difficult empirical judgments").

In short, such an "open-ended balancing test[]" is both "[v]ague" and "manipulable." *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004). Its application here would be, too. To take this type of case, it would be straightforward (and, in our view, correct) for judges to find a state's interest in protecting children important enough to justify regulating unproven sterilizing transition interventions. See *Eknes-Tucker*, 80 F.4th at 1234–36 (Brasher, J., concurring). Many judges, though, will defer to certain American medical interest groups and dismiss the state's interest as "pretextual" because those judges weigh the costs and benefits differently. *E.g.*, *Poe* v. *Labrador*, 709 F. Supp. 3d 1169, 1182, 1193 (D. Idaho 2023) (finding "[m]ost significant[]" the positions of "every major medical organization in the United States"). Some courts—relied on by the United States (Br. 33)—have even suggested that they would hold these laws to violate *rational basis review*, an absurdity that only underscores the certain conflicts. See *Doe* v. *Ladapo*, No. 23-cv-114, 2024 WL 2947123, at *28 (N.D. Fla. June 11, 2024).

Thanks to the vague and standardless nature of the intermediate scrutiny test, any holding on intermediate scrutiny could be defended, at minimum based on disagreements over how "substantially related" these laws are to preventing harms to

children. As shown by the *amicus* briefs in this case, judges would be called on to resolve scientific, psychological, statistical, medical, and moral questions—over and over. See *State* v. *Loe*, 692 S.W.3d 215, 239 (Tex. 2024) (Blacklock, J., concurring) ("This case arises from irreconcilably conflicting visions of what it means for doctors to do 'harm or injustice' to children experiencing confusion and distress about the normal biological development of their bodies.").

Judges are not (generally) "statisticians," "psychologists, [or] doctors," *Duncan* v. *Bonta*, 19 F.4th 1087, 1150 (CA9 2021) (Bumatay, J., dissenting), much less "arbiter[s] of our Nation's moral standards." *Roper* v. *Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting). Yet they will be required to adjudicate cases by assessing and balancing these disparate considerations and more, in the context of new and evolving treatments, then to decide whether "a substantial relation" exists. Under this "grand balancing test in which unweighted factors mysteriously are weighed," "'equality of treatment is impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.'" *June Med. Servs. LLC* v. *Russo*, 591 U.S. 299, 348 (2020) (Roberts, C.J., concurring in judgment) (cleaned up) (quoting A. Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989)).

"There is no plausible sense in which anyone, let alone [the courts], could objectively assign weight to such imponderable values and no meaningful way to compare them if there were." *Ibid.* "Pretending that [judges] could pull that off would require" them "to act

as legislators, not judges, and would result in nothing other than an unanalyzed exercise of judicial will." *Id.* at 348–49 (cleaned up).

"The inherently standardless nature of this inquiry invites the [judge] to give effect to his personal preferences" about the law at issue. *Planned Parenthood of Se. Pennsylvania* v. *Casey*, 505 U.S. 833, 992 (1992) (Scalia, J., concurring in judgment in part and dissenting in part). Ultimately, intermediate scrutiny will be "just window dressing for judicial policymaking." *Duncan*, 19 F.4th at 1148 (Bumatay, J., dissenting). "Favored policies may be easily supported by cherry-picked data"—or anything else, from societal views to medical opinions—"under the tier's black box regime." *Ibid.* "Without rules that actually bind judges, personal intuition inescapably fills the void." *Id.* at 1166 (VanDyke, J., dissenting).

Hence, for instance, a recent opinion (relied on by the United States) declaring that the "arc of the moral universe" "bends toward" sterilizing interventions for children with gender dysphoria. *Ladapo*, 2024 WL 2947123, at *4 (comparing dissenters with racists). See also, *e.g.*, *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610, 612, 620 (CA4 2020) ("It is time to move forward."; and accusing dissenters of "fantastical fears and unfounded prejudices"); cf. *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

The same problems would afflict the courts' consideration of all the other highly fraught cases

discussed above, involving sports, private facilities, homeless shelters, prisons, health insurance, and much more. Compare *B.P.J.* v. *W. Virginia State Bd. of Educ.*, 649 F. Supp. 3d 220, 232 (S.D. W. Va. 2023) ("The legislature's definition of 'girl' as being based on 'biological sex' is substantially related to the important government interest of providing equal athletic opportunities for females."), with *B.P.J.*, 98 F.4th at 559–62 (the opposite).

These problems would only be exacerbated if courts continue to adopt an emerging theory of "as-applied" intermediate scrutiny. See, *e.g.*, *id.* at 557–59. On that theory, even if a law satisfies intermediate scrutiny, any person can claim an exemption by showing that the state's objective may not fully apply to that person. That theory transforms intermediate scrutiny into the functional equivalent of strict scrutiny by requiring otherwise constitutional laws to perfectly fit the challenger's individual circumstances, and it contradicts this Court's precedents. *E.g.*, *Cleburne*, 473 U.S. at 446 (Courts "should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case."); see generally Br. of Concerned Women for America & Samaritan's Purse as *Amici Curiae* 4–20, *West Virginia* v. *B.P.J.*, No. 24-43 (U.S. Aug. 15, 2024) ("[I]t is incoherent to ask whether the law's application to a single plaintiff is permissibly overinclusive.").

If courts continue to adopt this as-applied intermediate scrutiny theory, though—and this Court redefines the relevant classifications as the United States urges—courts would be swamped with endless

class-of-one claims by individuals with undefined, subjective, and ever-changing identities. Federal judges would become *ex officio* prison wardens, homeless shelter leaders, athletic directors, insurance claims processors, and principals. Or, perhaps more likely, government bodies would give up, letting everyone access whatever teams, facilities, treatments, cells, and shelters they want because "[n]o state official in his right mind will buy such a high-cost, high-risk lawsuit" by stopping anyone. *Virginia*, 518 U.S. at 597 (Scalia, J., dissenting). The victims will be, ironically enough, biological women whose plight supposedly gave rise to intermediate scrutiny to begin.

What happens in the lower courts would happen here too—and because of the certain divisions that would result in these contentious cases, this Court would be presented with the same questions soon enough (probably in an emergency posture to start). This Court has no better guideposts than it has given the lower courts. "No wonder those cases end up" "dividing along lines that seem predictable to the public." Kavanaugh, *supra*, at 1919; see *Whole Woman's Health* v. *Hellerstedt*, 579 U.S. 582, 635 (2016) (Thomas, J., dissenting) ("[H]ow easily the Court tinkers with levels of scrutiny to achieve its desired result."). This inevitable division undermines the Court's legitimacy and mocks the promise that ours is "a government of laws and not of men." Mass. Const. part 1, art. XXX; see *Dobbs*, 597 U.S. at 290–91 (explaining that "it is important for the public to perceive that our decisions are based on principle"). "[N]othing but empty words" would "separate[] [its]

constitutional decisions from judicial fiat." *Hellerstedt*, 579 U.S. at 635 (Thomas, J., dissenting).

In sum, extending intermediate scrutiny as the United States demands "seems calculated to perpetuate give-it-a-try litigation before judges assigned an unwieldy and inappropriate task." *Dobbs*, 597 U.S. at 286 (cleaned up). Going down this road would "undermine, not advance, the evenhanded, predictable, and consistent development of legal principles." *Ibid.* (cleaned up).

C. Extending intermediate scrutiny has no constitutional basis.

Though extending intermediate scrutiny would be unworkable as shown above, perhaps the best reason to decline the United States' extension is that the doctrine itself has no foundation in the Constitution. It would be one thing if the Constitution required unelected judges to assess laws passed by the People based on their own conceptions of what goals are "important" and how closely a policy matched a goal. But "[t]he Founders of the Nation were not naive or disregardful of the interests of justice," *Ullmann* v. *United States*, 350 U.S. 422, 427 (1956), and they did not saddle judges with that policymaking task. Cf. *Williams-Yulee* v. *Fla. Bar*, 575 U.S. 433, 445 (2015) (Unlike "the legislature, the judiciary" has "neither force nor will but merely judgment." (quoting The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton))).

Intermediate scrutiny, like the other "tiers of scrutiny," "ha[s] no basis in the text or original meaning of the Constitution." *Rahimi*, 144 S. Ct. at

1921 (Kavanaugh, J., concurring) (quoting J. Alicea & J. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, National Affairs 72, 73 (2019)); cf. R. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1268, 1273–74 (2007) (noting the absence of "any textual basis" or "foundation in the Constitution's original understanding" for heightened scrutiny).

Intermediate scrutiny "c[ame] out of thin air." *Craig*, 429 U.S. at 220 (Rehnquist, J., dissenting). "The Equal Protection Clause contains no such language." *Ibid.* Instead, "[t]he Court 'appears to have adopted' heightened-scrutiny tests 'by accident' in the 1950s and 1960s in a series of Communist speech cases, 'rather than as the result of a considered judgment.'" *Rahimi*, 144 S. Ct. at 1921 (Kavanaugh, J., concurring) (quoting *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 125 (1991) (Kennedy, J., concurring in judgment)). It did not extend intermediate scrutiny to sex classifications under the Equal Protection Clause until *Craig* in 1976. R. Kelso, *The Structure of Intermediate Review*, 25 Lewis & Clark L. Rev. 691, 697 (2021).

Thus, in this case purportedly about the meaning of a constitutional amendment ratified in 1868—in front of a Court that properly interprets the law "in accord with the ordinary public meaning of its terms at the time of its enactment," *Bostock*, 590 U.S. at 654—the United States as petitioner cites no case decided before 1971. It does not even try to argue that the original meaning of the Equal Protection Clause was that sex treatment-based (much less gender identity-based) classifications would be subject to the

modern notion of intermediate scrutiny. And for good reason: "Prior to 1971, there was no suggestion in Supreme Court opinions that anything other than minimum rational basis scrutiny would be applied to gender classifications in state or federal law." Kelso, *supra*, at 697.

From the start, as many Justices have recognized, intermediate scrutiny was arbitrarily chosen in diverse contexts to serve as a balancing test, never with any foundation in the Constitution. See *Heller*, 670 F.3d at 1281 (Kavanaugh, J., dissenting) ("From the beginning, it was recognized that those tests were balancing tests."); *Virginia*, 518 U.S. at 568 (Scalia, J., dissenting) ("We have no established criterion for 'intermediate scrutiny,'" "but essentially apply it when it seems like a good idea to load the dice."); Tr. of Oral Arg. at 44, *Heller* v. *District of Columbia*, 554 U.S. 570 (No. 07-290) (Chief Justice Roberts: "Well, these various phrases under the different standards that are proposed, 'compelling interest,' 'significant interest,' 'narrowly tailored,' none of them appear in the Constitution . . . . I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up.").

More, as discussed above, this "vague and amorphous test[] can at times be antithetical to impartial judging." Kavanaugh, *supra*, at 1919. One problem with that is outcome-oriented (and inconsistent) decision-making. Another is that "manipulable means-ends balancing tests" "elevate[] the normative views of 'we the judges' over 'We the People.'" *United States* v. *Jimenez-Shilon*, 34 F.4th

1042, 1050, 1054 (CA11 2022) (Newsom, J., concurring). Yet another is that it deprives the People acting through their representatives their entitlement "to know *before they act* the standard to which they will be held, rather than be compelled to guess about the outcome of Supreme Court peek-a-boo." *Virginia*, 518 U.S. at 574 (Scalia, J., dissenting); see also *Jimenez-Shilon*, 34 F.4th at 1054 (Newsom, J., concurring) ("the doctrine is judge-empowering" and "freedom-diluting").

All this provides a compelling reason for the Court to decline to extend the atextual, ahistorical, unworkable, and "made-up" test of intermediate scrutiny to these new frontiers. *Hellerstedt*, 579 U.S. at 635 (Thomas, J., dissenting) (quoting *Virginia*, 518 U.S. at 570 (Scalia, J., dissenting)).

"[T]his [C]ourt in a very special sense is charged with the duty of construing and upholding the Constitution; and, in the discharge of that important duty, it ever must be alert to see that a doubtful precedent be not extended" "if the result will be to weaken or subvert" constitutional principles. *Dimick* v. *Schiedt*, 293 U.S. 474, 485 (1935). For that reason, the Court has repeatedly declined to extend other dubious innovations. See, *e.g.*, *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 220 (2020) (identifying "[t]he question" as "whether to extend those precedents to the 'new situation' before" the Court); *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) (similar).

To be sure, the more theoretically correct route may well be to acknowledge this Court's obvious error and stop using intermediate scrutiny under the Equal

Protection Clause. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious *racial* discrimination in the States." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (emphasis added). So "if the question of the applicable standard of review for sex-based classifications were" at issue, the best argument "would be . . . for reducing it to rational-basis review." *Virginia*, 518 U.S. at 574–75 (Scalia, J., dissenting). "Long after the adoption of the Fourteenth Amendment, and well into [the last] century, legal distinctions between men and women were thought to raise no question under the Equal Protection Clause." *Id.* at 560 (Rehnquist, C.J., concurring in judgment).

Moreover, women now "constitute a majority of the electorate," "[a]nd the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns." *Id.* at 575 (Scalia, J., dissenting). "[A] long list of legislation proves" the point. *Id.* at 575–76 (collecting statutes).

Perhaps for that reason, intermediate scrutiny has largely been transformed into a device to protect *men* from supposed discrimination—now, echoing the United States' theory, men who identify as women and seek to co-opt their lived experiences, take their place

on sports teams, and invade their private spaces.[10] To tell the truth, this Court's intermediate scrutiny cases have mostly been about men from the get-go.[11] That is a far distance from what the Equal Protection Clause originally meant to the ratifying public.

The Court need not tackle this larger problem here—though, if it expands intermediate scrutiny in the way the United States demands, it will have to confront this problem soon enough. Here, it suffices to decline to extend a doctrine that has no roots in the Constitution and no neutral judicial principles. If this

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[10] See, *e.g.*, *Doe* v. *Horne*, 115 F.4th 1083 (CA9 2024); *B.P.J.*, 98 F.4th 542; *Hecox* v. *Little*, 79 F.4th 1009 (CA9 2023), *opinion withdrawn*, 99 F.4th 1127 (CA9 2024); *Doe* v. *Hanover Cnty. Sch. Bd.*, No. 3:24-cv-493, 2024 WL 3850810, at *1 (E.D. Va. Aug. 16, 2024); *Tirrell* v. *Edelblut*, No. 24-cv-251, 2024 WL 3898544 (D.N.H. Aug. 22, 2024); *D.H.* v. *Williamson Cnty. Bd. of Educ.*, 638 F. Supp. 3d 821 (M.D. Tenn. 2022); *A.M.* v. *Indianapolis Pub. Sch.*, 617 F. Supp. 3d 950 (S.D. Ind. 2022); *Tay* v. *Dennison*, 457 F. Supp. 3d 657 (S.D. Ill. 2020).

[11] See *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975) (widower); *Craig*, 429 U.S. 190 (male seeking to buy alcohol); *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) (widower); *Orr* v. *Orr*, 440 U.S. 268 (1979) (husband); *Caban* v. *Mohammed*, 441 U.S. 380 (1979) (father); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (widower); *Michael M.* v. *Superior Ct. of Sonoma Cnty.*, 450 U.S. 464 (1981) (male accused of statutory rape); *Lehr* v. *Robertson*, 463 U.S. 248 (1983) (delinquent father); *Heckler* v. *Mathews*, 465 U.S. 728 (1984) (male seeking pension benefits); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982) (male seeking access to nursing school); *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (father who failed to pay child support challenging strike of male juror); *Nguyen* v. *INS*, 533 U.S. 53 (2001) (male criminal); *Sessions* v. *Morales-Santana*, 582 U.S. 47 (2017) (same, asserting right of father).

Court doubts whether intermediate scrutiny applies here, it should resolve those doubts against extending that baseless doctrine.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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OCTOBER 15, 2024